

**Introduced by Senator Jackson**

February 12, 2014

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An act to amend Sections 261, 261.6, 264, and 290 of the Penal Code, relating to sex offenses.

**LEGISLATIVE COUNSEL'S DIGEST**

SB 991, as introduced, Jackson. Sex offenses: second degree rape.

(1) Under existing law, rape is an act of sexual intercourse accomplished under specified circumstances, including, among others, where the act was accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person of another. Under existing law, rape is a felony. Under existing law, sodomy is sexual conduct consisting of contact between the penis of one person and the anus of another. Under existing law, oral copulation is the act of copulating the mouth of one person with the sexual organ or anus of another person. Under existing law, an act of sodomy, oral copulation, or sexual penetration accomplished against a victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person is a felony.

Existing law defines consent for purposes of the above crimes to mean positive cooperation in act or attitude pursuant to an exercise of free will.

This bill would define an act of sexual intercourse, sodomy, oral copulation, or sexual penetration which is accomplished without the affirmative and freely given consent of the victim as rape in the 2nd degree. The bill would make rape in the 2nd degree a felony punishable by imprisonment in the state prison for 2, 3, or 4 years for the first offense, and by imprisonment in the state prison for 3, 6, or 8 years for

a 2nd or subsequent violation. The bill could make the defendant ineligible for probation for a 2nd or subsequent violation, and if probation is granted for a first offense, the bill would allow the conditions of probation to include a requirement to make payments to a rape victim counseling center or to reimburse the victim for the reasonable costs of counseling, as provided.

The bill would define consent for these purposes, and for purposes of the above existing crimes, to mean positive cooperation in act or attitude pursuant to an exercise of free will, which is affirmatively and freely given.

By creating a new crime, this bill would impose a state-mandated local program.

(2) Existing law requires persons convicted of specified sex offenses, or attempts to commit those offenses, to register with local law enforcement agencies while residing in the state or while attending school or working in the state.

This bill would require a person convicted of rape in the 2nd degree to register with local law enforcement agencies as a sex offender. By imposing additional duties on local authorities, and by creating a new crime by requiring additional persons to be registered as sex offenders, this bill would create a state-mandated local program.

(3) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that with regard to certain mandates no reimbursement is required by this act for a specified reason.

With regard to any other mandates, this bill would provide that, if the Commission on State Mandates determines that the bill contains costs so mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: yes.

*The people of the State of California do enact as follows:*

- 1 SECTION 1. Section 261 of the Penal Code is amended to
- 2 read:
- 3 261. (a) Rape *in the first degree* is an act of sexual intercourse
- 4 accomplished with a person not the spouse of the perpetrator, under
- 5 any of the following circumstances:

1 (1) Where a person is incapable, because of a mental disorder  
2 or developmental or physical disability, of giving legal consent,  
3 and this is known or reasonably should be known to the person  
4 committing the act. Notwithstanding the existence of a  
5 conservatorship pursuant to the provisions of the  
6 Lanterman-Petris-Short Act (Part 1 (commencing with Section  
7 5000) of Division 5 of the Welfare and Institutions Code), the  
8 prosecuting attorney shall prove, as an element of the crime, that  
9 a mental disorder or developmental or physical disability rendered  
10 the alleged victim incapable of giving consent.

11 (2) Where it is accomplished against a person's will by means  
12 of force, violence, duress, menace, or fear of immediate and  
13 unlawful bodily injury on the person or another.

14 (3) Where a person is prevented from resisting by any  
15 intoxicating or anesthetic substance, or any controlled substance,  
16 and this condition was known, or reasonably should have been  
17 known by the ~~accused~~ *perpetrator*.

18 (4) Where a person is at the time unconscious of the nature of  
19 the act, and this is known to the ~~accused~~ *perpetrator*. As used in  
20 this paragraph, "unconscious of the nature of the act" means  
21 incapable of resisting because the victim meets any one of the  
22 following conditions:

23 (A) Was unconscious or asleep.

24 (B) Was not aware, knowing, perceiving, or cognizant that the  
25 act occurred.

26 (C) Was not aware, knowing, perceiving, or cognizant of the  
27 essential characteristics of the act due to the perpetrator's fraud in  
28 fact.

29 (D) Was not aware, knowing, perceiving, or cognizant of the  
30 essential characteristics of the act due to the perpetrator's fraudulent  
31 representation that the sexual penetration served a professional  
32 purpose when it served no professional purpose.

33 (5) Where a person submits under the belief that the person  
34 committing the act is someone known to the victim other than the  
35 accused, and this belief is induced by any artifice, pretense, or  
36 concealment practiced by the accused, with intent to induce the  
37 belief.

38 (6) Where the act is accomplished against the victim's will by  
39 threatening to retaliate in the future against the victim or any other  
40 person, and there is a reasonable possibility that the perpetrator

1 will execute the threat. As used in this paragraph, “threatening to  
2 retaliate” means a threat to kidnap or falsely imprison, or to inflict  
3 extreme pain, serious bodily injury, or death.

4 (7) Where the act is accomplished against the victim’s will by  
5 threatening to use the authority of a public official to incarcerate,  
6 arrest, or deport the victim or another, and the victim has a  
7 reasonable belief that the perpetrator is a public official. As used  
8 in this paragraph, “public official” means a person employed by  
9 a governmental agency who has the authority, as part of that  
10 position, to incarcerate, arrest, or deport another. The perpetrator  
11 does not actually have to be a public official.

12 (b) (1) *Rape in the second degree is an act of sexual intercourse,*  
13 *an act of sodomy as described in subdivision (a) of Section 286,*  
14 *an act of oral copulation as described in subdivision (a) of Section*  
15 *288a, or an act of sexual penetration as described in paragraph*  
16 *(1) of subdivision (k) of Section 289, which is accomplished without*  
17 *the affirmative and freely given consent of the victim, and a*  
18 *reasonable person would not have believed there was affirmatively*  
19 *and freely given consent. In a prosecution made pursuant to this*  
20 *subdivision, the prosecutor is required to demonstrate that the*  
21 *defendant did not reasonably believe that affirmative consent had*  
22 *been freely given.*

23 (2) *In determining whether consent was affirmatively and freely*  
24 *given, the totality of the circumstances, including the age of the*  
25 *victim, his or her relationship to the defendant, and any handicap*  
26 *or disability of the victim, and any threats of hardship not*  
27 *amounting to duress, shall be considered.*

28 ~~(b)~~

29 (c) As used in this section, “duress” means a direct or implied  
30 threat of force, violence, danger, or retribution sufficient to coerce  
31 a reasonable person of ordinary susceptibilities to perform an act  
32 which otherwise would not have been performed, or acquiesce in  
33 an act to which one otherwise would not have submitted. The total  
34 circumstances, including the age of the victim, and his or her  
35 relationship to the defendant, are factors to consider in appraising  
36 the existence of duress.

37 ~~(e)~~

38 (d) As used in this section, “menace” means any threat,  
39 declaration, or act which shows an intention to inflict an injury  
40 upon another.

SEC. 2. Section 261.6 of the Penal Code is amended to read:

261.6. In prosecutions under Section 261, 262, 286, 288a, or 289, in which consent is at issue, “consent” shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will, *which is affirmatively and freely given*. The person must act ~~freely and~~ voluntarily and have knowledge of the nature of the act or transaction involved.

A current or previous dating or marital relationship shall not be sufficient to constitute consent where consent is at issue in a prosecution under Section 261, 262, 286, 288a, or 289.

Nothing in this section shall affect the admissibility of evidence or the burden of proof on the issue of consent.

SEC. 3. Section 264 of the Penal Code is amended to read:

264. (a) Except as provided in subdivision (c), rape, as defined in *subdivision (a) of Section 261 or Section 262*, is punishable by imprisonment in the state prison for three, six, or eight years.

(b) In addition to any punishment imposed under this section the judge may assess a fine not to exceed seventy dollars (\$70) against any person who violates Section 261 or 262 with the proceeds of this fine to be used in accordance with Section 1463.23. The court shall, however, take into consideration the defendant’s ability to pay, and no defendant shall be denied probation because of his or her inability to pay the fine permitted under this subdivision.

(c) (1) Any person who commits rape in violation of paragraph (2) of subdivision (a) of Section 261 upon a child who is under 14 years of age shall be punished by imprisonment in the state prison for 9, 11, or 13 years.

(2) Any person who commits rape in violation of paragraph (2) of subdivision (a) of Section 261 upon a minor who is 14 years of age or older shall be punished by imprisonment in the state prison for 7, 9, or 11 years.

(3) *Rape in the second degree, as defined in subdivision (b) of Section 261, is punishable by imprisonment in the state prison for two, three, or four years. A second or subsequent act of rape in the second degree, brought and tried separately, is punishable by imprisonment in the state prison for three, six, or eight years and the defendant shall not be eligible for probation.*

(4) (A) *If probation is granted upon conviction for a first violation of subdivision (b) of Section 261, the conditions of*

1 *probation may include, in lieu of a fine, one or both of the*  
2 *following:*

3 *(i) That the defendant make payments to a rape victim*  
4 *counseling center of not more than one thousand dollars (\$1,000).*

5 *(ii) That the defendant reimburse the victim for reasonable costs*  
6 *of counseling and other reasonable expenses that the court finds*  
7 *are a direct result of the offense.*

8 *(B) The court shall make a determination of the defendant's*  
9 *ability to pay, and in no event shall any order to make payments*  
10 *to a rape victim counseling center be made if it would impair the*  
11 *ability of the defendant to pay direct restitution to the victim.*

12 ~~(3)~~

13 *(5) This subdivision does not preclude prosecution under Section*  
14 *269, Section 288.7, or any other provision of law.*

15 SEC. 4. Section 290 of the Penal Code is amended to read:

16 290. (a) Sections 290 to 290.024, inclusive, shall be known  
17 and may be cited as the Sex Offender Registration Act. All  
18 references to "the Act" in those sections are to the Sex Offender  
19 Registration Act.

20 (b) Every person described in subdivision (c), for the rest of his  
21 or her life while residing in California, or while attending school  
22 or working in California, as described in Sections 290.002 and  
23 290.01, shall be required to register with the chief of police of the  
24 city in which he or she is residing, or the sheriff of the county if  
25 he or she is residing in an unincorporated area or city that has no  
26 police department, and, additionally, with the chief of police of a  
27 campus of the University of California, the California State  
28 University, or community college if he or she is residing upon the  
29 campus or in any of its facilities, within five working days of  
30 coming into, or changing his or her residence within, any city,  
31 county, or city and county, or campus in which he or she  
32 temporarily resides, and shall be required to register thereafter in  
33 accordance with the Act.

34 (c) The following persons shall be required to register:

35 Any person who, since July 1, 1944, has been or is hereafter  
36 convicted in any court in this state or in any federal or military  
37 court of a violation of Section 187 committed in the perpetration,  
38 or an attempt to perpetrate, rape or any act punishable under  
39 Section 286, 288, 288a, or 289, Section 207 or 209 committed  
40 with intent to violate Section 261, 286, 288, 288a, or 289, Section

1 220, except assault to commit mayhem, subdivision (b) and (c) of  
2 Section 236.1, Section 243.4, paragraph (1), (2), (3), (4), or (6) of  
3 subdivision (a) of, *and subdivision (b) of*, Section 261, paragraph  
4 (1) of subdivision (a) of Section 262 involving the use of force or  
5 violence for which the person is sentenced to the state prison,  
6 Section 264.1, 266, or 266c, subdivision (b) of Section 266h,  
7 subdivision (b) of Section 266i, Section 266j, 267, 269, 285, 286,  
8 288, 288a, 288.3, 288.4, 288.5, 288.7, 289, or 311.1, subdivision  
9 (b), (c), or (d) of Section 311.2, Section 311.3, 311.4, 311.10,  
10 311.11, or 647.6, former Section 647a, subdivision (c) of Section  
11 653f, subdivision 1 or 2 of Section 314, any offense involving  
12 lewd or lascivious conduct under Section 272, or any felony  
13 violation of Section 288.2; any statutory predecessor that includes  
14 all elements of one of the above-mentioned offenses; or any person  
15 who since that date has been or is hereafter convicted of the attempt  
16 or conspiracy to commit any of the above-mentioned offenses.

17 SEC. 5. No reimbursement is required by this act pursuant to  
18 Section 6 of Article XIII B of the California Constitution for certain  
19 costs that may be incurred by a local agency or school district  
20 because, in that regard, this act creates a new crime or infraction,  
21 eliminates a crime or infraction, or changes the penalty for a crime  
22 or infraction, within the meaning of Section 17556 of the  
23 Government Code, or changes the definition of a crime within the  
24 meaning of Section 6 of Article XIII B of the California  
25 Constitution.

26 However, if the Commission on State Mandates determines that  
27 this act contains other costs mandated by the state, reimbursement  
28 to local agencies and school districts for those costs shall be made  
29 pursuant to Part 7 (commencing with Section 17500) of Division  
30 4 of Title 2 of the Government Code.